



SPECIAL MEETING
PUBLIC EMPLOYEES' RETIREMENT BOARD

NOVEMBER 21, 2005

A special meeting of the Board was called to order by President Carey at 9:00 a.m. Monday, November 21, 2005. All members of the Board were present, either in person or via conference phone. Board members and staff present were:

Carole Carey, President
Betty Lou Kasten, Vice President
Robert Griffith, Member
Jay Klawon, Member
Troy McGee, Member
John Paull, Member
Terry Smith, Member
Michael O'Connor, Executive Director
Melanie Symons, Counsel
Linda Owen, Secretary

OPEN MEETING

Kathy McGowan, MSPOA; Ann Brodsky and Vivian Hamel, Governor's Office; Dave Bohyer and David S. Niss, Legislative Services Division; Matt Gouras, Associated Press; Gwen Florio, Great Falls Tribune; Jim Kembel, TIAA-CREF; Tom Schneider, MPEA; Stephen C. Kologi, Dale Taliaferro, and Jim Christnacht, AMRPE; Anita Teichrow; Robin Rowe and Don Kinman, AFSCME; Douglas H. Neil, Montana State Firemen's Association; Warren Smetzer and Kim Greco, Laborers' Local #1686; John Shontz, Montana Newspaper Association; Terry Teichrow; Kim Flatow, Member Services Bureau Chief; and Roxanne Minnehan, Fiscal Services Bureau Chief; and Carolyn Miller, Administrative Officer, MPERA, attended the meeting.

Public Comment – David Niss, with the Legislative Services Division, commented that if the Board rescinds their employment contract with Mr. Teichrow, he would like to know how much a settlement would cost and who would pay for it.

Ms. Symons summarized that at the November 16, 2005 meeting, the Board was scheduled to discuss the Governor's letter regarding concerns he had with the hiring process. The night before the meeting, the Governor filed a lawsuit, so Ms. Symons advised the Board that, at that point, the agenda did not include the lawsuit and it was determined the meeting would be canceled. The meeting was renoticed with the lawsuit included on the agenda. There will be comments from the Board, and they will address both the lawsuit concerns and concerns in the Governor's letter.

Mr. McGee gave a brief statement: "The personnel committee, of which he was a member, made every effort to follow the recruitment and selection policies of the Board. The document outlines the procedures to be followed when recruiting for the Executive Director position and is readily available from staff. Twice before, the Human Resource Office in the Department of Administration (DOA) had provided the procedures, guidance, and professional knowledge for the

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recruitment and selection procedures for this position. Because of this knowledge and background, the committee elected to use this Human Resource Office for recruitment of this position again. During this effort, we followed the guidance of this professional completely. During the two-month period of this recruitment effort, no one on the committee, no one on the Board staff, no one from the DOA, or anyone from the public proposed that the work sessions be posted. In summary, it never was the intention to keep the public from participating in the process, but rather to assure fairness and equal treatment for all of the applicants. This included keeping their names in confidence, as they requested.”

Mr. Klawon stated he did not realize the Board had a “feud” going on with the Governor’s Office until he read it in an Associated Press article that hit the papers and the radio stations. He is somewhat stunned at the amount of heat and some of the accusations the Board is getting from the Governor’s budget director.

Mrs. Kasten stated that as soon as the Board involved the DOA in the hiring process, the Governor’s Office was also involved, and it was Mrs. Kasten’s understanding that Dave Ewer was appointed to represent the Governor in all matters. It was agreed by the Board that Mr. Ewer could attend any of the meetings, and she believes most of the meetings he was aware of. They were not posted on the website because the Board knew the meetings would be closed. The public does not participate in personnel evaluations or hiring. Mrs. Kasten noted that in the newspaper, it said that because Mr. Ewer could not attend the meeting, that Judy Paynter would. The Board was concerned that if they continued to go down a list of people, then it should have been open to the public. As it was at the October meeting, the person who appeared and offered to sit in on the meetings was Janet Kelly, Director of the Department of Administration, not Mr. Ewer or Ms. Paynter. The Board advised Ms. Kelly there was already a person from DOA who had been with the Board every step of the way and they did not feel it was necessary to have two people from the DOA.

Response to Litigation – Ms. Symons stated the complaint that was filed in this matter by Governor Schweitzer was based on only one issue that was in his letter to the Board. His letter had four different issues; the complaint was one, and that is whether or not the Board violated the open meeting laws when it conducted some of its meetings regarding the hiring process. Ms. Symons stated the Board has done nothing different than it normally has done. Under the perception that because personnel matters, normally, are confidential and that, normally, the public is not permitted to participate or attend those meetings, it did not cross the minds of the committee members, and the committee was not directed by any person from any entity, to have those meetings be in public. Now that this has been brought to the Board’s attention, they will discuss whether those meetings should have been noticed, even if the public would not be able to participate in those meetings. If the Board determines that, perhaps, that was not done properly, then they need to consider the complaint and whether to proceed in court or, perhaps, look at other options.

Mr. McGee stated he has been in three hiring processes and the committees went through the same process, guided by the same DOA Human Resources individual's knowledge and competency. It never occurred to the committee that it was necessary for these "work sessions" to be posted. Other than being an oversight, there was no reason not to post them.

Mrs. Kasten asked if, at one time, the DOA was required to participate in the hiring process. She understood that is no longer so, that the authority rests in the Board and they have complete authority to hire. Ms. Symons stated that was correct. A statute was passed in 1997 giving the Board the authority to hire the executive director, and set the pay pursuant to the rules guarding pay for public employees.

Mrs. Kasten asked Ms. Symons if, in her opinion, the three people on the personnel committee constituted a quorum and had the ability to make any binding decisions on the Board. Ms. Symons stated it was her understanding that three people were the personnel committee, and so the three people, or two people, of that personnel committee would be a quorum of that committee. At any time that three people, or two people, of that committee were meeting, it should have been posted pursuant to the open meeting rules and pursuant to the Board policy regarding posting meetings. Mr. Klawon felt the Board was dealing with a mere technicality. Mr. Klawon would like to appeal to the Governor's sense of fair play and now that everyone knows what has transpired, to call upon the Governor to drop the lawsuit.

David Niss stated what is relevant is the fact that the personnel committee is a subcommittee of the Board and meetings by either or both of those bodies must be announced to, and open to, the public. Mr. McGee felt it was an oversight of the Board not to post the meetings as they should have. There were many instances where this could have been brought to the Board's attention, but the situation is such that it may be better to do the process all over again. Mr. Klawon stated Mr. Ewer could have brought this oversight to the Board's attention when he asked them to extend the hiring timeline another two weeks because not enough applications had been received. The Board could have corrected the situation before making a job offer to Mr. Teichrow.

Mr. Paull wanted everyone to know there was certainly no intent by the Board to do anything wrong or illegal. A couple of oversights may have occurred, but to have the Board railed through the press certainly was not fair and he did not appreciate being "dragged through the mud" on this issue. If there were mistakes being made, it could have been brought up, and should have been brought up, prior to the November 16 meeting.

Mrs. Kasten stated they are saying the decision to hire Mr. Teichrow was done at the three-person personnel committee. President Carey explained that during the selection process, at no time did the committee discuss whom they wanted in the executive director position. They simply went through the procedure as guided by the DOA Human Resource professional. The committee scored the applicants individually, narrowing it down, first to three people, and then there were two others extremely close. In order to be fair to everyone involved, those other two applicants were included in the interviews with the full Board. When the Board concluded the five interviews, it was not a fast or easy decision which person to offer the position to. The Board debated for at least 2½ hours. For the Governor's office to say the initial hiring was decided by the three-person personnel committee is way off base.

Mr. O'Connor stated the whole issue is the personnel committee meetings and decisions that were made in those meetings that were not noticed to the public. That is the issue, not whether or not the committee decided at those meetings who the executive director would be. There was a meeting that should have been noticed, but was not. What it boils down to is that anything that came out of those meetings is null and void. The whole process needs to be redone.

Mr. Klawon asked that, since this was a personnel issue, at this point, would it be prudent to close the meeting? Ms. Symons stated the Board does have it noticed to go into executive action. She agrees that the decisions that came out of the improperly posted meetings, if the Board was to go to court, might possibly be declared void. The statute is discretionary; it says 'may.' There would, perhaps, be the possibility that because most of these meetings would not have been open anyway, the harm that was done might have been minor.

The decision was made to hire Mr. Teichrow and as a result of that decision, an offer was made and was accepted, and there is an employment contract. Ms. Symons explained that at this point, the Board would not only have to void their decisions made at the personnel committee meetings, but also void the contract with Mr. Teichrow. Then, whatever Mr. Teichrow decides is a totally separate issue. This is a contract issue and a public meeting notice issue. It is not because of any personnel action that would warrant termination of a contract. At this point, whether or not to void the contract is an issue that should be discussed in public.

Mrs. Kasten asked if, with the way the agenda was written, the Board could meet with the newly hired executive director before they return to the open meeting and make a motion and a decision? Ms. Symons' suggestion was that the Board not meet with the new executive director until they have made a decision on whether to void the meetings and void the contract. Ms. Symons advised the Board not to meet in private until they have made a motion and a decision on what they want to do regarding redoing the interview process and what to do with Mr. Teichrow's contract.

John Shontz, general counsel for the Montana Newspaper Association, stated that the public's "right to know" and the open meeting law are constitutional rights of this state. It is the view of the Association that Montana's constitutional rights have been violated in this process, whether or not it was intentional. Mr. Shontz spoke briefly about notices and meeting the public notice provisions of the law.

President Carey stated that the Board needs to decide whether to go forward with this litigation and try to fight it, or make some other determination. Ms. Symons advised the Board that she was not ready to provide legal advice on settlement negotiations. She would like to be given the opportunity to research the issue before the Board moves forward on a settlement.

Executive Action – Executive Director Position –Mr. Klawon stated that, from a fiduciary standpoint and in light of the fact that the Governor's lawsuit will cost the retirement systems, potentially, a good deal of money, the Governor leaves the Board no option, at this point, other than to void the contract offered to Mr. Teichrow.

Mr. Klawon made a motion to void the employment contract with Terry Teichrow and give Board counsel time to research the process of a settlement before we discuss that any further. The Board will reopen the hiring process immediately, and encourage Mr. Teichrow to reapply. Mr. McGee seconded the motion, which upon being submitted to vote, was duly carried with the seven members voting aye.

Mrs. Kasten queried that, in essence, the Board was taking “in good faith” that, if they void this employment contract, the Governor would no longer seek retribution. The Governor’s legal counsel was asked to respond.

Ann Brodsky, attorney for the Governor’s Office, addressed the Board’s question of: “If the Board passes their motion to void Mr. Teichrow’s employment contract and then asks for a Motion to Dismiss on the action the Governor has filed against the Board, would he resist this or dismiss the action?” Ms. Brodsky stated she does not make those decisions; her client (the Governor) makes the decisions. She added that the Governor’s lawsuit claims that meetings the Board and the personnel committee conducted violated the “right to know” and “right to participate” provisions in the Montana Constitution and according to Montana statutes. The lawsuit asks the court to void those decisions. Ms. Kasten added that another remedy they may want is for the Board to pay attorneys’ fees or any other relief the court may feel justified in asking for. Ms. Brodsky said that was correct. As attorney for the Governor, Ms. Brodsky reiterated that she does not know what her client will do. It is the client’s decision on how to proceed with the lawsuit. Ms. Brodsky stated she was in attendance to find out what the Board decides and she will report back to the Governor for his direction. Mr. Klawon called for the question, for the simple reason that, whether the Governor wishes to pursue this or not, it is out of the Board’s hands, but at least the Board did what they could to save the system as much money as possible.

The settlement issue will be taken up at a later date. Mr. O’Connor felt uncomfortable putting pressure on Board counsel to make a decision on the settlement issue in a short period of time while the meeting is still in progress. Mr. Teichrow stated he would not expect the Board to address this issue with him today, nor is he prepared or would want to address this today. He would be agreeable to address this at the December 9, 2005 regular Board meeting. Ms. Symons added that the Governor’s lawsuit is a separate matter, although intertwined in what will happen as a result of the Board’s motion.

Mr. McGee made a motion to direct the Board’s Legal Counsel to file a Motion to Dismiss on the Governor’s lawsuit. Mr. Griffith seconded the motion, which upon being submitted to vote, was duly carried with the seven attending members voting aye.

Hiring Committee Assignment – In order to keep the hiring process as clean as possible, President Carey appointed a new selection committee. She asked that Mrs. Kasten, Mr. Klawon and Mr. Paull be on the committee and that Mrs. Kasten be the Chair. Mrs. Kasten commented that the original committee did an excellent job in selecting the final list of applicants that the full Board interviewed. Knowing there are those looking for minor irregularities, Mrs. Kasten asked that, if they go through the entire hiring process once again, following as much advice on allowing the public to participate as possible, will the administration agree to accept the results, regardless of what those results might be? No one responded. Mrs. Kasten added that, assuming the administration was not adverse to the person hired, but merely to the fact that the Board did not “cross all the “t’s” and dot all the “i’s,” that she, too, will accept the committee position.

Hiring Process Alternatives – The Board felt it was best that the Department of Administration, or any governmental agency, did not handle this hiring process. Mr. O'Connor recommended the Board work with CMS, the personnel consultant the MPERA has worked with before on other Human Resource issues. They are very knowledgeable about the state hiring processes, and have had previous experience with hiring high-level positions such as the executive director. Mr. O'Connor felt they would do a good job in guiding the Board through the entire process. Mr. Griffith made a motion to hire CMS. Mrs. Kasten seconded the motion. Mr. Smith questioned if other financial executive search firms that are out there should be considered. Mr. Klawon noted that the Board has dealt with CMS in the past and they have given the Board good advice. Plus, there is a need to get this process started as soon as possible because MPERA will soon be left without an executive director. The public offered no comments. President Carey called for the question, which upon being submitted to vote, was duly carried with the seven attending members voting aye.

Contracting for Outside Legal Services – Ms. Symons suggested that, in light of previous discussion during this meeting, the Board might want to talk, in general, about whether they are comfortable with the Board attorneys or want to get a second opinion. Mrs. Kasten felt that, since the Board was just going to ask for a dismissal of the lawsuit, she suggested using the Board's in-house attorneys. Mr. McGee added that, if the Board experiences any problem with the dismissal, they could consider outside legal services at that time. However, he would like staff to begin search for outside legal counsel now.

Statement by President Carey – “As President of the Montana Public Employees Retirement Board, I have pondered a great deal over what I would say to you today. I went back to our Governance Principles of this board which state: “It is the mission of the Board as fiduciaries to administer its retirement systems and trust funds, acting in the best interests of the members and beneficiaries.” With that in mind, it cannot serve our participants, retirees, or our taxpayers any useful purpose for two government agencies to continue this fight. Our people deserve more, and it is for this reason that I called this meeting.

I would first like to state that I have been a member of this board for many years and it has never been, nor is it now, that this board has held secret, illegal meetings to keep the public in the dark. This board and the people on it would never be a party to anything as low as we have been accused of. We all take our duties very seriously and have always operated in an open, upfront manner. If anyone has any questions on any particular issue, they need only to contact our staff to get the complete answers they require. The only exception to this is when a person's right to privacy exceeds the public's right to know. We then honor the person's right to privacy.

I would like to address the underhanded, eleventh hour, dirty tricks that the Governor and his budget director, David Ewer, have pulled on this board and me. On November 10, at 5:58 p.m., the eve of a 3-day weekend, I got a call from the Governor's office that a fax was coming into my office. When I read this letter, I was shocked and stunned. I did call Melanie and Mike,

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who were both still at work and we discussed this matter until well after 6:00 p.m. Melanie checked the Internet and the story was already on the Helena Independent Record website. I immediately set up a special meeting for Wednesday, November 16, and notified the Governor that we wanted to meet with him, and Mr. Ewer, and get this matter settled. I had the awful job of calling Terry Teichrow to let him know what happened, and the next phone call he got was from a reporter with the Independent Record. Mr. Ewer was in the papers reporting all of this to the media and I was criticized for only saying we were having a meeting on Wednesday to get this settled. After driving 500 miles to Helena, arriving in town dog tired, I received a call from our attorney that we were served with a complaint, well after 4 p.m., and were being sued by the governor on this issue.

I arrived at the office of our attorney early the next morning, and Betty Lou Kasten, our Vice President, and I decided we had to cancel the meeting as anything the board said we could be held liable for, yet they could say anything and bare no blame. We had to have time for our attorney to at least study and analyze the complaint and see if it had merit or not. We, after all, had taken time from our jobs, driven miles, and one member risked his life on ice to attend, only to learn the Governor had no interest in working this out. Their lame excuse was they were up against a statute of limitations. They could have filed that lawsuit the night of November 10, because they full well knew they did not wish to try and work things out. We, at least, could have gotten prepared and had our meeting on the 16th instead of having to wait until today. I was then chastised for not letting Mr. Ewer question each of us individually and, of course, I had no comment for the paper. Mr. Ewer again had plenty to say, and a lot of it a figment of what he wishes and imagines this situation to be. Mr. Ewer has never even attended one of our meetings to see what our problems and concerns are. Dave Lewis and Chuck Swysgood attended meetings and many times had staff people there. I am disgusted with this "I am from the government, I know what you need and I am here to help you" attitude when they don't know a darn toot what they are talking about. I am incensed at the low life way "the new day in Montana Government" is being run. The heavy handed Gestapo maneuvers and late, last minute antics are unconscionable to me. The people of Montana deserve better than this, as does our board.

In closing, I will say my integrity has been challenged, my ability questioned and my character has been defamed. Governor Schweitzer and David Ewer, you both owe me a personal apology, as well as an apology to all our board members. We are a volunteer board, who work very hard to make government in Montana work better. In my case, I drive 1,000 miles each month to attend this board, I spend at least one full weekend studying the 1/3 to 1/2 ream of material we get each month to study so we can be ready for our board meetings. I have done this since 1992 and I do it because I want to make certain that government works, and I have always felt eastern Montana needs a voice. Volunteer boards are a very important part of the governmental make up of this state and the Administration and agencies need to hear the concerns outside Helena, where the bureaucratic "bs" is pretty darn deep, and get someone who is not afraid to stand up and do the right thing. Our Governor must learn to respect these boards and not simply bypass their decisions by going to the press or using every strong-arm tactic he can dream up. We are in for a very rocky next three years in Montana. With that I will let someone else speak."

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Statement by Terry Teichrow – “I make these statements in the public comment section as an active PERS member and past PER Board (PERB) member, as well as a key figure in the issue before us today and the past few weeks. The following comments are my personal opinions and observations.

The past few weeks have shown us some irresponsible press coverage; some irresponsible comments made to the press; and an irresponsible lawsuit being filed against the Retirement Board. All of the comments to the press, as well as the reporting by the press, are damaging the MPERA division, the Board, individual board members, and their ability to function in the best interest of the system, and function for the best interest of the members in the future.

I can only believe the comments, and in my opinion, the misrepresentation of this board’s actions by some individuals, as ignorance of the Board’s history over the last 16 years.

Some of the issues or quotes that have appeared in the press are:

1. Questioning my qualification as the best candidate for the Executive Director position,
2. Suggesting a lack of sufficient competency by this Board and others related to investment losses,
3. Poor investment returns and ill-advised benefit increases, and
4. Importance of the need for proper fiscal management.

I would like to offer my knowledge of the reality related to these issues.

My qualifications: I served on the Board for 16 years and 12 as the Chairman. Over that 16-year period, all serving board members and I had to deal with almost every issue related to the administration of PERS and MPERA. We studied the law, documents, and informative articles, had outside presentations, attended national conferences and reviewed an unending stream of information about this division, as well as comparisons to other systems.

During the 12 years as Chairman of the Board, I was directed by consensus or nomination by the Board to participate on almost every committee, in every legislative session, and dealt with every governor’s office. I have also dealt with issues within the MPERA office that were important to the successful administration of the systems and our service to the active and retired members of the plans. I also know what the division needs to do to provide important service to active and retired members.

I applied for this position because my background, including 17 years in program management with the Office of Public Instruction and 16 years on the PERB, fit the qualifications for this job. My tenure on the Board provided experience for the very issues that the job description called for.

My qualifications and knowledge were reviewed, scored and evaluated by a group of people, the BOARD. Common sense dictates that this Board, like most boards, agencies or associations, is far more aware of its needs and the needs of the systems than any other agency, body, or individual.

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Proper fiscal management: If the reference to the media was to administrative fiscal management, it is noted that this board operates under a spending cap related to a percentage of the benefits paid each year. This board has always budgeted under that cap and, in fact, has always been **under budget**. There is no group more concerned or aware of fiscal and fiduciary responsibility than this board.

If the reference was to the fiscal management of the investments of the retirement system and recent investment losses, not enough has been said about the fact PERB DOES NOT invest the funds; nor does MPERA. The Board of Investments (BOI) does have the responsibility. A person must understand the ramifications of 9/11 and the downturn in the stock market that affected the investment returns. It is a misrepresentation and is irresponsible to implicate the Board with that responsibility.

The Board's lack of sufficient competency: The PERB has no lack of competence in their operation as a board. Most members in the subject time period have knowledge and experience far exceeding most states' retirement boards and the current administration because of the education process they went through in implementing a DC plan and acquiring the State 457 plan. They have never had a need to be experts in investing funds because the BOI has that responsibility and advised this board with needed information. When the stock market crashed and the fund went down, the BOARD understood the ramifications. I am not sure that the press, or those commenting to the press, still understands the effects of 9/11 and investment losses in 2002.

Ill-advised benefit increases: For many years before 1995, there were ongoing requests for ad hoc benefit increases and attempts to create a GABA. For years, this board listened to the complaints and pleas of retired members who did not have enough to live on. Throughout that time, the retirement system was under-funded, which meant any benefit increases would have been ill advised.

Finally in 1995, the Board acted under the provisions of MCA 19-2-403(9) and was able to recommend that the Legislature provide an increase in benefits to the members. The increased benefit was supported only because there was a surplus of funds in the system. The GABA passed the House on a vote of 78 to 21 and the Senate passed it 42-8. Tell the Legislature the recommendation was ILL ADVISED.

In 2001, because of a \$500 million plus surplus, the Board recommended an increase to GABA, plus other increases. Under MC 19-2-403(9), it was the Board's job! At that time, the Board left a \$120 million surplus for a buffer, which was deemed prudent at the time. This bill passed the House by a vote of 97-3 and the Senate 50-0.

Those concerned should ask the active members and retired members of the systems, and the Employee Associations, if they think the benefit increases were ILL ADVISED. This Board WAS NOT incompetent in this process. It was the responsible thing to do, although some now are criticizing this move as ill advised. Sadly, the events and effects of history far exceeded what anyone would have expected and Montana, as well as all retirement systems, have suffered.

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In my opinion, the Governor of the State of Montana, David Ewer, and the press owe the Montana Public Employee Retirement Board, the Montana Public Employee Retirement Administration, the members of the eight retirement systems, the Teachers' Retirement Board, the Board for the Board of Investments, and the State of Montana a public apology.

Now, the Board has to make a decision on the motion at hand. I know what you have to do, and must do in the best interest of the system and its members, avoiding the high financial drain that an embroiled lawsuit would cause. Under the provisions of MCA 19-2-404, "The Board shall hire and fix the compensation of an executive director." I will be applying for this position again. I would ask that you make sure that outside sources do not influence this process and that I receive fair consideration."

ADJOURNMENT - Mr. Klawon made a motion to adjourn the meeting. Mr. Griffith seconded the motion, which upon being submitted to vote, was duly carried with the seven attending members voting aye.